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Supreme Court, U.S.
FILED
OCT 26 1995
CLERK

No. 95-60

In The

Supreme Court of the United States

October Term, 1995

ALBERT G. BUSTAMANTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In opposing Petitioner's challenge to the Fifth Circuit Court of Appeals' interpretation of the federal gratuity statute, 18 U.S.C. § 201(c)(1)(B) [formerly 18 U.S.C. § 201(g)]. Respondent agrees that Petitioner's statement of the applicable law is correct. (Resp. 6) Respondent argues, instead, that review is unwarranted because the evidence was sufficient to support Petitioner's gratuity conviction. (Resp. 5-6 at n.5)

As set forth below, the "official" conduct relied on by Respondent is not based on the record evidence. Similarly, Petitioner's issues are not "raised for the first time in a petition for certiorari." (Resp. at 9)

I. PETITIONER NEITHER PERFORMED, NOR WAS REQUESTED TO PERFORM, "OFFICIAL ACTS" ON BEHALF OF OLIVER HEARD OR THE HEARD LAW FIRM.

Petitioner was convicted of receiving a gratuity in the form of a loan guarantee, and the promise of future loans, all at no personal risk. (Pet.App. 14-15) The court below construed the count of conviction broadly to encompass what was described as "the carry," or "a risk-free" investment. (*Id.*) Petitioner sought the loan in question to finance his purchase of an equity share in SAVC, a corporation formed to seek the purchase of a new television broadcasting license. (Pet.App. 11-12) Respondent does not contend that Petitioner either performed, or that Mr. Heard requested him to perform, any official act whatsoever in regard to the SAVC broadcast license application. (Resp. at 5) Nor does Respondent suggest that Petitioner's participation in the SAVC investment, in itself, constituted an "official act" within the meaning of the statute.[1]

---

[1] 18 U.S.C. § 201(a)(3) provides in part that:

(a) For the purposes of this section –

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

Relying on the opinion of the court below, Respondent describes the factual basis of Petitioner's gratuity conviction as follows:

> Noting (Pet.App. 16) that petitioner brought no broadcasting experience to SAVC; that petitioner's Hispanic ethnicity was not the basis for SAVC's claim to a minority preference; and that petitioner "certainly added no financial strength to the venture," and *considering* (*ibid.*) *that Heard's firm called on petitioner to assist it in his official capacity,* the court concluded that "the jury was entitled to find that Heard and Macon sustained [petitioner] because he was a member of the United States Congress." *Id.* at 16.

(Resp. at 5-6) (emphasis supplied). Respondent then argues that the foregoing evidence "equally supports the inference that petitioner knew why he was receiving the no-risk investment." (Resp. 9)

Respondent's opposition to Petitioner's request for review is fact based and is taken from the "Statement of Facts" section of the Government's brief in the court below. (Resp. 5-6 at n.5)

First, Respondent states that, in May of 1985, Mr. Heard "sought petitioner's assistance in obtaining a multi-million dollar contract from the City of San Antonio." According to Respondent, "Petitioner lobbied for Heard with the city council, and Heard's firm obtained the contract." (Resp. 5 at n.5) Second, Respondent states that, in April of 1989, "Heard's firm obtained petitioner's assistance in an effort to amend a federal statute that exempted federal banking agencies and credit unions from local property taxes." (Resp. 5-6 at n.5)

As the following discussion will reveal, Respondent's reliance on the Government's brief in the court below is misplaced.

A. There Is No Record Evidence That Petitioner Performed, Or Was Requested To Perform, "Official Acts" On Behalf Of Oliver Heard Or The Heard Law Firm In Regard To The 1985 City Tax Collection Contract.

In 1985, the San Antonio city council was considering whether to privatize its delinquent tax collection functions. During

the month of May 1985, the privatization issue was on the city council's agenda each week. If the City voted to privatize its tax collection function, it would award the collection contract to a law firm. Three law firms sought the contract from the City, one of which was the firm of Heard, Goggan, Blair and Williams, headed by Mr. Oliver Heard. The Heard firm had been collecting delinquent taxes for various taxing entities, including the surrounding county, for a number of years. A staff analysis of the various law firms, conducted by the City Attorney's Office prior to the vote, concluded that the Heard firm was best qualified to receive the contract.[2]

Though a majority of the city council was in favor of the privatization, two City Councilwomen, Ms. Helen Dutmer and Ms. Maria Berriozabal opposed the plan. The Government called Ms. Berriozabal to testify about the tax collection issue as it stood in 1985.

Specifically, the Government asked Ms. Berriozabal whether she had been lobbied before the vote by anyone to elicit either her support for, or opposition to, the privatization plan. Ms. Berriozabal testified that she had been lobbied to oppose privatization by a local citizens group, and had been lobbied to support the plan by Mr. John Heard, an attorney whose firm was seeking the collection contract from the City.[3] In response to questions by the prosecutor, Ms. Berriozabal stated that she had never been lobbied by either Oliver Heard, Larry Macon, or petitioner's wife, Ms. Rebecca Bustamante. Ms. Berriozabal was then asked if she had ever spoken with Petitioner about the tax contract:

> Q: All right. Did you ever speak with Albert Bustamante about the contract?

---

[2] As described by Mr. Lowell Denton, the City Attorney in 1985, the factors that went into the decision to award the contract to the Heard firm were the size of the organization; the firm's assurance that they had the immediate computer capacity to do the job; and the fact that the Heard firm was already collecting taxes for the county and, thus, could do the job automatically by merely adding the City to the list. In addition, Mr. Denton testified, the Heard firm had a proven track record.

[3] John Heard is an attorney and the brother of Oliver Heard; he is, and was, not professionally associated with Oliver Heard.

A: Yes, sir.

Q: Albert Bustamante was in Congress at that point in time.

A: Yes, sir.

Q: All right. Tell us about this conversation, where did it take place and when did it take place.

A: I don't know when it took place. I just know –

Q: All right. Was it face to face –

A: – that it was before the vote. No, it wasn't face to face.

Q: Was it a telephone conversation?

A: Yes, sir. A phone call.

Q: All right. Do you know, do you recall where Congressman Bustamante was at the time?

* * *

A: I just, I thought he was calling from Washington.

Q: All right. It wasn't a local call here in San Antonio?

A: I'm not sure, sir.

* * *

Q: Now, how long did this telephone conversation take place? If you recall.

A: Five minutes, something like that.

Q: All right. What did the Congressman say to you about the proposal to privatize the tax collection contract?

A: He just told me that the firm of Oliver Heard was a good firm, they would do a good job for the city.

* * *

Q: All right. And What did Congressman Bustamante tell you about, did he ask for your support, did he ask you to vote a particular way?

* * *

A: He, just to say that it was a good firm. That they would do good work for the city.

(Vol. VII, 85-9)

Ms. Berriozabal's testimony, excerpted above, is the only evidence in the record to support Respondent's assertion that Oliver Heard "sought petitioner's assistance" in obtaining the multi-million dollar tax contract from the City of San Antonio. Plainly, there is no evidence that Mr. Heard sought petitioner's assistance in the matter. Nor does the evidence suggest that petitioner's telephone call to Ms. Berriozabal was anything but a purely personal or private act, as opposed to an "official" act, as defined at 18 U.S.C. § 201(a)(3).[4] Certainly, the privatization of the City of San Antonio's delinquent tax collection function was not a "question" or "matter" which could be brought before Petitioner in his official capacity as a United States Congressman, or which he would be called upon to take action or render a decision.

Nor does the record support Respondent's implication of a cause-and-effect relationship between Petitioner's telephone call to Maria Berriozabal and the City's ultimate decision to award the tax contract to Oliver Heard's firm. (Resp. 5 at n.5) A majority of the city council was already in favor of privatizing the tax collection function. Despite Petitioner's telephone call, Ms. Berriozabal voted against privatization of the City's tax collection function.

B. There Is No Record Evidence That Either Mr. Heard, Or The Heard Firm, "Obtained Petitioner's Assistance" In An Effort To Amend A Federal Statute.

According to Respondent, in April of 1989, "Heard's firm obtained petitioner's assistance in an effort to amend a federal statute that exempted federal banking agencies and credit unions from local property taxes." (Resp. 6 at n.5) The only evidence in the record to support Respondent's assertion comes from the

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[4] Like both Mr. Heard and Mr. Macon, in mid-1985, Ms. Berriozabal had known petitioner for more than fifteen years; their relationship extended back to the time when he served as county commissioner of Bexar County, Texas, and she served as secretary to the county judge.

testimony of Lowell Denton. Mr. Denton was the City Attorney for San Antonio, during the time the city council was considering the privatization issue. In 1986, Mr. Denton went to work for Oliver Heard where he managed the firm's San Antonio delinquent tax practice.

Toward the end of his direct testimony, Mr. Denton was asked to discuss a letter he had written to Petitioner in April of 1989. At the request of the prosecutor, Mr. Denton read the letter to the jury:

> Dear Congressman: In accordance with our telephone conversation this morning I am supplying you with a copy of the relevant federal statutes pertaining to the taxation of real property held by the FSLIC, FDIC, and the properties held by federal credit unions.
>
> For some reason, unlike other federal financial institutions, Congress has not subjected the assets of federal credit unions to state and local taxation. The problem that our local government clients are presently confronting involves assets foreclosed by the credit union. Because of the local market conditions, these properties are now being held for substantial periods of time off of the local tax rolls.
>
> We thank you on behalf of our clients for your commitment to assist us in attempting to analyze this problem and take appropriate steps at the Congressional level. As I indicated to you by telephone, I am available to assist you or your staff in any way that would be helpful . . .
>
> I would be pleased to go to Washington at your convenience to work toward resolution of these issues. I look forward to discussing our options with you at your earliest convenience."

Asked why he had written the letter to Petitioner, Mr. Denton responded:

> A: Because I felt like it was wrong for Congress to exempt a federal credit union for paying a local ad valorem tax, when every other institution pays it.

Mr. Denton explained that he disagreed with the federal credit union exemption, and had addressed his complaints not only to

Petitioner, but to Congressman Henry B. Gonzalez, who served on the banking committee;[5] and to Senators Bentsen and Gramm.

On cross-examination, in response to questions by defense counsel, Mr. Denton made clear that, in writing Petitioner and other members of Congress, he was attempting to bring his personal views to the attention of his elected representatives:

Q: Now, is it fair to say that, and based upon what you've testified to earlier, that *the reason you wrote this letter is because you felt like the was wrong*? (Emphasis supplied)

A: That's true.

* * *

Q: Let me rephrase it, Mr. Denton, so that there's no mistake about it, and so that this jury understands. *The reason you wrote this letter to Congressman Bustamante is because you, personally, Mr. Lowell Denton, felt it was wrong for the Government to be sitting on these properties and not have to pay taxes on them.*

A: Well, I have to break your question down to answer it. *I did feel that way, still feel that way. I think I wrote the letter because I felt like the clients were entitled to have that problem addressed by Congress.* (Emphasis supplied)

Q: And the clients, these are the taxing entities?

A: That's correct.

Q: And so, on behalf of your clients that you represent, you have a right to alert your Congressman to something you feel like is wrong.

A: Yes, sir.

Q: And it's just unjust.

A: Yes, sir.

Q: And you still feel that way today?

A: Yes, sir, I do.

---

[5] While a member of Congess, Petitioner served on the Armed Services committee.

Q: And, if the Congressman looked at this and said, I agree, I think that's wrong, and it's not right. And he took steps to change it. And let's say it was changed, and these properties were put on the tax rolls. It does not follow from that, that either you, Oliver Heard, Heard Goggan Blair, or anybody associated with you or that law office, was going to gain one red cent. Was it?

A: That was not my purpose in writing the letter.

The excerpted testimony of Mr. Lowell Denton is the only evidence in the record to support Respondent's assertion that, in April of 1989, "Heard's firm obtained petitioner's assistance in an effort to amend a federal statute that exempted federal banking agencies and credit unions from local property taxes." (Resp. 6 at n.5) There is no evidence in the record that Mr. Denton was directed to write a letter to Petitioner, or any other member of Congress, by Mr. Heard, or by anyone else at the Heard firm. Nor, indeed, is there any record evidence that Mr. Heard had knowledge of Mr. Denton's contacts. Surely, Petitioner's conduct in speaking with Mr. Denton on the telephone, and receiving his letter of complaint, was simply the usual and ordinary business of a representative and legislator.

We suggest that Petitioner's "acts," as described by Ms. Berriozabal and Mr. Denton, are not the sort of acts contemplated by the gratuity statute. If Petitioner's contacts with Ms. Berriozabal and Mr. Denton are deemed sufficient to support his conviction, then the notion of what constitutes an "official act" has been expanded far beyond the plain language of the text. Surely, the ordinary acts of an individual are not transformed *ipso facto* into "official acts" merely because the individual is elected to public office. Contrary to Respondent's position, the facts of Petitioner's case suggest that review by this Court is warranted.

II. THE PROBLEM WITH *UNITED STATES V. EVANS.*

Respondent argues that, because Petitioner did not raise the issue in the court below, the distinct question of "whether proof is required of the recipient's knowledge respecting the donor's intent" was not addressed. (Resp. 8) Respondent points out that the court below resolved Petitioner's sufficiency challenge by relying on its

earlier decision in *United States v. Evans,* 572 F.2d 455 (5th Cir. 1978) (en banc). (Resp. 8-9) Respondent further argues that the Fifth Circuit did not call into question its earlier analysis of the gratuity statute in the context of Petitioner's case. (Resp. 8-9)

To be sure, *Evans'* articulation of the level of *mens rea* required to support a gratuity conviction conflicts with this Court's interpretation of the statute in *United States v. Brewer,* 408 U.S. 501 (1972), by eliminating the question of the donee's knowledge of the donor's intent. *United States v. Evans,* 572 F.2d at 480. Thus, in *Evans,* the Fifth Circuit concluded:

> [Section] 201(g) makes it criminal for a public official to accept a thing of value to which he is not lawfully entitled, *regardless of the intent of the donor or donee.*

Id. (emphasis supplied).

In applying *Evans* to Petitioner's case, the court ignored the issue it had explicitly left open, viz, whether a higher level of *mens rea* is required under the gratuity statute when applied to the conduct of an *elected* public official. *Id.* at 481 n.30. Having failed to consider the issue left open in *Evans,* it is unsurprising that the Fifth Circuit failed to address the question of whether Petitioner had the requisite knowledge of Heard's intent. Under *Evans,* that inquiry was irrelevant.

III. PETITIONER'S ISSUES ARE NOT PRESENTED FOR THE FIRST TIME IN A PETITION FOR CERTIORARI.

Respondent argues that this Court should decline to grant the writ because Petitioner's claims are "not properly raised for the first time in a petition for certiorari." (Resp. 9) On the contrary, Petitioner moved for judgment of acquittal on the gratuity count in the trial court on the specific ground that the Government had failed to prove any connection between the gratuities alleged and any of Petitioner's official acts. (Pet. 9-10) On appeal, Petitioner challenged the sufficiency of the evidence to convict him of having received an illegal gratuity, and framed his issue broadly, *viz.*:

> The Government Failed To Prove That Mr. Bustamante Knowingly Received An Unlawful Gratuity In

Exchange For "Official Acts Performed And To Be Performed" As Alleged In Racketeering Act Number 3.[6]

On appeal, Petitioner argued that the Government had failed to prove his knowledge of the existence of the Heard loan guarantee, or any linkage between the benefit received and his official conduct. (Appt.'s Br. C.A., 25-33)

Following the affirmance of his convictions, Petitioner filed a timely Petition For Panel Rehearing, and timely Suggestions Of A Party For Rehearing En Banc. There, Petitioner specifically challenged the court of appeals' broad interpretation of the federal gratuity statute (Sugg. Rehr'g En Banc C.A., 6-7); argued that the court had effectively dispensed with the requirement of *mens rea* (Sugg. Rehr'g En Banc C.A., 6-7, 12-13); and pointed out the court's failure to address the issue of *mens rea* left open in *United States v. Evans, supra.* (Sugg. Rehr'g En Banc C.A., 7-9, 13)

The court below was presented with all of Petitioner's issues fully, fairly, and directly.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Honorable Court will grant certiorari to review the decision of the court of appeals in this case.

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[6] Racketeering Act 3 is identical to the substantive offense charged in Count Four.

Respectfully submitted,

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